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Brief of Farnham for P.
IN THE

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JAMES H. MCNAUL

SUPREME COURT OF THE UNITED STATES.

Filed Feb. 24, 1899.

RECORD, CASE NO. 16781.

TERM NO. 229. OCTOBER TERM, 1898.

THE NEW ENGLAND RAILROAD COMPANY, *Plaintiff in Error*

vs.

ROBERT T. CONROY, ADMINISTRATOR.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

FRANK A. FARNHAM,

Counsel for Plaintiff in Error.



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STATEMENT OF FACTS.

This was an action brought by Conroy, administrator, defendant in error, to recover damages for the death of one Gregory, a freight brakeman in the employ of the plaintiff in error. On December 15, 1894, a freight train of the railroad company, whose crew consisted of an engineer, a fireman, three brakemen and a conductor, left Worcester, Massachusetts, for Providence, Rhode Island, about 7.15 P.M. the train consisting of a locomotive and tender with about fourteen loaded freight cars. It proceeded to a point in the state of Rhode Island where about midnight, while the train was in motion, the engineer discovered by the motion and behavior of the locomotive that the train had broken apart, the break occurring between the first and second cars of the train. He immediately gave signals with the whistle to indicate to the trainmen upon the rear portion that it was broken off, and continued to repeat these signals while the locomotive and one car ran three-quarters of

a mile. The front portion of the train ran about two and three-fourths miles when the engineer, not being able to see anything of the rear portion of the train, and supposing that his signals had been heard and its advance stopped, slowed up the engine preparatory to sending the fireman back with a lantern and taking steps for restoring the connection of the parts of the train. Before speed had been so reduced that the fireman could alight from the train, the rear portion was discovered close at hand and rapidly approaching. The fireman gave notice of this fact and signalled for the locomotive to go ahead, but before it could gain speed to get away a collision between the two parts of the train took place, and said Gregory, who was head end brakeman and who had been riding in the locomotive but had gone to the top of the first car when the separation was discovered, was thrown from the car by the shock and instantly killed.

The conductor and middle and rear brakemen had been riding in the caboose at the rear end of the train, and had not heard the warning signals which the engineer gave, nor known that the train had broken until the collision, but remained all the time in the caboose. The night was cold and clear.

The negligence complained of consisted in the alleged failure of the conductor in view of all the circumstances as to the character of the road, the speed of the train, and its liability to break apart, properly to supervise its movements, and the fact that he permitted the middle brakeman to remain in the caboose and failed to order him to the brakes.

The jury returned a verdict for the plaintiff and assessed damages in the sum of four thousand two hundred and fifty dollars.

The defendant brought the case by writ of error to the United States Circuit Court of Appeals for the First Circuit. After full argument the Judges of that Court in order to obtain instructions of the Supreme Court of the United States have certified the following questions of law arising upon the facts.

1. Whether the negligence of the conductor was the negligence of a fellow servant of the deceased brakeman.
2. Whether the negligence of the conductor was the negligence of its vice, or substituted principal, or representative, for which the corporation is responsible.

BRIEF OF THE ARGUMENT.

The point on which the instruction of this court is requested divides itself in the argument into two considerations:

1. Is the conductor of a train ever by virtue of his office so clothed with the management and control of a distinct department as to be a vice-principal? And if so,

2. Under the circumstances of this case was the alleged negligence of the conductor in respect of acts in which he was a vice-principal or in respect of acts in which he was a fellow servant with the trainmen?

I.

The necessary data to determine whether a conductor by virtue of his office may be a vice-principal are ready at hand. There would be little advantage in going outside of the two decisions of this court which embody all the principles of law necessary to decide the question, viz.

Baltimore & Ohio R.R. Co. vs. Baugh, 149 U. S. 368.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Ross, 112 U. S. 377.

By an inexact method of expression it may be said that the decision of this question will determine whether the Ross case is still valid law or whether it no longer represents the opinion of this court. It is submitted however that such a finding is not involved in the decision of this case. The principle on which the Ross case was decided is undoubtedly valid. Whether or not the facts as to the powers and duties of the conductor which were assumed in that case, and which therein controlled the decision of the court, were such as to justify the application of the principle therein made, yet such application would not be justified by the facts in the case at bar or in any case likely to arise in future.

The principle of departmental control is too firmly established to admit of argument. This is the principle which governed the decision not only in the Ross case but in all cases decided by this court in recent years upon that branch of law. On the authority of the Baugh case the principle may be briefly stated as follows: Where the entire management of a business is put on a superintendent, he, though only an agent, is almost universally recognized as a representative of the principal. When the business becomes so vast and diversified that it neces-

sarily separates into departments of service, the individuals placed in charge of these departments and given entire management and control therein are practically considered, as to their subordinates, vice principals. This rule can be fairly applied only when the different branches and departments are in themselves separate and distinct, as for instance between the law department and the operating department of a railroad, or the operating and manufacturing or repair department. From this natural separation flows the rule that one in charge of such separate branch is in place of the master.

This principle has been further amplified and applied in

Northern Pacific R.R. Co. vs. Hambly, 154 U. S. 349.

Central R.R. Co. vs. Keegan, 160 U. S. 259.

Northern Pacific R.R. Co. vs. Peterson, 162 U. S. 346.

Alaska Mining Co. vs. Whelan, 168 U. S. 86.

If the principle were to be drawn only from these decisions of the court and the Ross case were not in existence, it is submitted that no one would venture to ask from this court a finding that a conductor of a train, in the discharge of his duties as such, was so clothed with the control of a separate department as to be a vice principal. The obvious inference from this decision is that a conductor is a fellow servant with the other trainmen. Is there anything in the Ross case that negatives this inference, and necessitates a finding as to the powers and duties of a conductor so far at variance with the natural import of the language used in these cases?

In the Ross case the precise point before the court was the correctness of the charge given by the judge in the court below, which was as follows:

"It is very clear that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow servants engaged in the same common employment within the meaning of the rule of law of which I am speaking."

That this charge was incorrect will be admitted. In the decision of this court it was stated that the language might be open to verbal criticism, but it was held that in view of the facts as to the conductor's relations to the train the language was not prejudicial to the plaintiff in error, and that the court would not reverse the finding. The court below decided the

case on the theory that a subordinate was not a fellow servant with the one exercising immediate authority over him. While this court held that such principle was incorrect and that the control which negatived the relation of fellow service must be the control of a department, it held also that under the circumstances of that case the conductor was in control of a separate department, and therefore was not a fellow servant with the injured trainman. This proposition now seems sufficiently clear in view of the explanation of the Ross case in many decisions beginning with Howard vs. Denver & Rio Grande Ry. Co. 26 Fed. Rep. 837, and extending to the latest decisions of this court, and in view of the more complete development and delimitation of the principle of departmental control in several recent cases and notably in the Baugh case. Now that we have a complete exposition of this theory it is easy to see how it furnished the underlying basis for the Ross decision, but as this advantage did not exist at that time, it is equally easy to see how the case gave rise to so much confusion. Although the principle furnished the underlying ground for the decision, yet it is difficult to believe that the court held in mind and clearly recognized the principle in its now accepted aspect. One who was committed to the principle of immediate control could find in the Ross case a basis for his theory, and for applying it wherever an employee was injured by the negligence of one who had charge of the particular piece of work on which the injured man was engaged. Taking into consideration the close division of the court and the fact that the language of the decision can be used to give countenance to either theory, *i. e.* departmental control or immediate control, it may be questioned whether all of the five Justices who concurred in the majority opinion would have subscribed to a statement of the law as now determined and decisively eliminating from the question any consideration of mere control by one servant over another.

Although the principle of the decision is now held to have been a correct one yet the result reached by its application was unexpected.

In Howard vs. Denver & Rio Grand Ry. Co. Mr. Justice Brewer stated:

"I think I only voice the general judgment of the profession in saying that the decision in the Ross case was a surprise and that it carried the doctrine of departmental control to the extreme."

Although the present case can be decided upon the principle which governs both the Ross case and the Baugh case, yet it is submitted that a decision cannot be made which shall be absolutely consistent with the real views entertained by the majority of the court in each case. In the Baugh case after a statement of the theory of departmental control follows this language: "But this is a very different proposition from that which affirms that each separate piece of work in one of these branches of service is a distinct department, and gives to the individual having control of that piece of work the position of vice-principal or representative of the master. Even the conclusion announced in the Ross case was not reached by a unanimous court, four of its members being of the opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train."

In an opinion manifestly written with a purpose of ending the existing confusion in the law, so significant a comment on a former decision of the court could not have been made without an appreciation of its importance, making obvious, as it did, the inference that the court now entertained grave doubt as to the accuracy of the former decision. The later decisions of court have done nothing to weaken this inference, but on the contrary have made sharper by repetition in different language the opinion of the court that a department is not a single piece of work of the same kind with others in the same business, but an essential branch of the business itself.

As the application of the principle made in the Ross case was not then in question no clearer intimation as to the views of the court could have been expected than was made in the above quotation. Mr. Justice Field, however, disagreed with the opinion of the majority and in the freedom of a dissenting opinion stated the effect of the decision, and probably stated no more than would have been admitted by the majority. His words are as follows: "The opinion of the majority not only limits and narrows the doctrine of the Ross case, but in effect denies, even with the limitations placed by them upon

it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes, is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable unless it extends to an entire department of service." In other words, the opinion of the majority states in effect and the dissenting opinion states in terms that the Ross case no longer represents the opinion of the court. Apparently therefore in the case at bar the conductor cannot be held a fellow-servant with the trainmen consistently with the real opinion of all the majority in the Ross case, nor on the other hand could he be held a vice-principal consistently with the opinion of the majority in the Baugh case and the later decisions of the court.

Although a decision of this case may necessarily conflict with the real opinion of some of the majority in the Ross case, yet it is submitted there need be no conflict with any principle involved in that decision. This statement rests on the peculiar view entertained by the court as to the scope of a conductor's power. If the meaning of the word "department" is arrived at by a narrow construction of the principle, it is possible to conceive of a single railroad train constituting a department. In such case it would be necessary that one in control should be absolutely in control in all particulars, and it is on this precise theory that the Ross decision proceeded. This is evident not only from that case itself but from the comments upon it in later cases. The following is the conclusion of the court on the Ross case :

"We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it and control over the persons employed upon it, represents the company, and therefore that for injuries resulting from his negligent acts the company is responsible."

The following is quoted from the decision in Northern Pacific R.R. Co. vs. Hambly, 154 U. S. 349: "*In that particular case* the court found that the conductor had entire control and management of the train to which he was assigned, directed at

what time it should start, at what speed it should run, at what stations it should stop and for what length of time, and everything essential to its successful movements, and that all persons employed upon it were subject to his orders. *Under such circumstances he was held not to be a fellow servant with the fireman, brakemen and engineers, citing certain cases from Kentucky and Ohio which maintained the same view.*"

The following is from Northern Pacific R.R. Co. vs. Peterson, 162 U. S. 346. "This court held the action was maintainable on the ground that the conductor *upon the occasion in question* was an agent of the corporation, clothed with the control and management of a distinct department, in which his duty was entirely that of direction and superintendence; that he had the entire control and management of the train, and that he occupied a very different position from the brakemen, porters and other subordinates employed on it; that he was in fact and should be treated as a personal representative of the corporation for whose negligence the corporation was responsible to subordinate servants."

However the court arrived at that view as to the scope of the conductor's powers it is evident that in any ordinary case, such as the case at bar, this state of facts is in the nature of things impossible. The court is asked to imagine the result if every train on a railroad constituted a separate department, the head of which, that is the conductor, determined all questions as to the conduct of his department, being responsible to no one under the terms of the organization, and being responsible to the company itself, as to the management of his own department, only when the company sees fit to resume the control which it had vested in him. There would be hundreds of departments using the same rails, each department being governed absolutely by the commands of its conductor. If each conductor determined at what time his train should start, at what speed it should run, and at what stations it should stop, the making of a schedule of trains would be an impossibility, unless all the conductors came together and agreed upon it, and the result of an attempt to come to such an agreement can be more easily imagined than described. It is a matter of common knowledge, and is necessary in the nature of things, that the schedule of trains is made by the general

officer of the operating department. By him are determined all the details as to the running of the trains, at what time they shall start, at what speed they shall run, at what stations they shall stop, of what trainmen the crew shall consist, by what rules they shall be governed, and in fact all of the details as to the management of the train. The conductor is merely one of the crew, appointed to carry out the specific duties assigned him, and to act as it were as a foreman of the crew, in view of the obvious necessity of having some head who shall be responsible to his immediate superior for the proper carrying out of each particular piece of work.

The facts assumed by the court in the Ross case are not binding upon the court in the case at bar. Whatever the facts were then they were merely the facts of that particular case, and have no bearing now. The conclusions of the court as to the scope of the conductor's powers then create no legal fiction to govern future cases in which the scope of these powers is involved. As the real facts are within the knowledge of the court it is submitted that these will determine its action, and not a previously made assumption of fact whether the same was or was not correct at the time.

A short summary of the argument on this head is as follows : The Baugh case determined beyond controversy the outlines of the principle of departmental control. The Ross case made an application of this principle before it had been definitely laid down by this court, and upon narrower lines than are now determined to be correct. Moreover the facts as to a conductor's position, which were then assumed to clothe him with the control of the narrow department therein outlined, were essentially different from the facts obtaining in this or in any ordinary case, and give him powers and duties far in excess of those he really holds. A single train is not a department, and the conductor has not exclusive control and management even of a single train, but is merely the head of that particular piece of work within a single department of the employer's business, and is therefore a fellow servant with the rest of the trainmen.

II.

Assuming that the conductor of a train may be by virtue of his office a vice-principal under some circumstances, yet under

the circumstances of this case the negligence complained of was not the negligence of the conductor as vice-principal.

(a) If the conductor had been vice-principal while the train held together, yet this relation to the head brakeman was severed when the train broke apart, and the engineer became in command of that portion of the train upon which the brakeman was riding. The Baugh case has decided that the portion in charge of the engineer would not be a separate department. But the argument has no bearing to show that the converse is true and that it still remained a part of the conductor's department. The portion of the train which was entirely removed from the conductor's control and from the reach of his orders, and subject to the orders of another person, could hardly be at the same time so under his control and management as to make him a vice-principal as to those employed upon it.

Newport News & Mississippi Valley Co. vs. Howe 52 Fed. Rep. 362 (p. 365)

(b) If the conductor is in any respect a vice-principal as to the other trainmen, he is not necessarily a vice-principal as to all of his duties. In the Ross case the negligence of the conductor upon which the company was held liable was his failure to transmit to the engineer a telegraphic order received by him from the train despatcher, requiring the train to take a certain siding in order to let another train pass. In the construction placed upon the conductor's duties this was considered to be an act in which he represented the principal. Here the only negligence complained of on the part of the conductor was his failure to see that the middle brakeman was on top of the train, where he could have detected the breaking apart and have heard the signals from the engine. If there was a breach of duty on the part of the conductor it was simply a breach of his duty as foreman of the crew, and not of his duty of general management and control of the department as a whole. So far as concerns his mere authority to direct the specific acts of the men under him, he has never been held to be a representative of the principal, but is merely a fellow servant with the rest.

Quinn vs. New Jersey Lighterage Co. 23 Fed. Rep. 363.

Hoke vs. St. Louis, Keokuk & Northern Ry. Co. 11 Mo. App. 574.

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